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No. 91-361

In The

Supreme Court of the United States

October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals Division Two

BRIEF OF RESPONDENTS JOHN AND ALICE ATWOOD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Arizona courts correctly conclude that personal jurisdiction could not be constitutionally asserted in Arizona against Respondents John and Alice Atwood, California residents who had no "minimum contacts" with Arizona, who did not purposefully direct any activities into or towards Arizona or purposefully avail themselves of any benefits or privileges of Arizona law, and where Arizona's exercise of personal jurisdiction over them would have been fundamentally unfair and unreasonable?

B. Should this Court overturn or substantially modify well-established principles from its prior decisions, by abandoning or disregarding any "purposeful direction" or "minimum contacts" requirements as threshold predicates for personal jurisdiction?

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STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is replete with factual allegations that are greatly overstated, and many of which have no relevance or application to Respondents John and Alice Atwood [hereinafter referred to as the "Atwood parents"]. Their son, Frank Jarvis Atwood, was 28 years old during the relevant time frame in 1984. The record compiled in the Arizona trial court established that the Atwood parents had no power or control whatsoever over Frank's parole conditions or supervision, let alone any ability to revoke his parole or have him arrested and taken into custody. The trial court record also established the following uncontested facts:

- The Atwood parents were not specifically advised of the terms or conditions of Frank's parole in May, 1984, when he was released from the California penal system; and the Notice and Conditions of Parole form was not signed by or furnished to the parents.
- There was no parole condition or requirement that Frank reside with his parents at any time, nor was there any parole condition obligating the parents to keep anyone informed of Frank's whereabouts, residence or anything else.
- The parents of an adult parolee are not required or expected to monitor or supervise the conditions of parole.
- Information furnished by relatives (including parents) of a parolee normally does not justify, or immediately result in, the revocation of parole or the arrest of the parolee, but rather corroborating information is needed.

These undisputed facts clearly refute Petitioners' contention of an "intentional failure," at least on the Atwoods' part, to "exercise their specific duty to control the actions of Frank Jarvis Atwood" [Petition at 4], let alone Petitioners' claim of "reckless and wanton conduct" on the part of the Atwood parents. [*Id.* at 6-7]. Contrary to Petitioners' repeated suggestions, the Arizona Court of Appeals did not assume, let alone find, that the Atwood parents engaged in any "reckless and wanton misconduct, intentionally undertaken with full awareness of the possible consequences" in Arizona. [*Id.* at 14]. Far from being "fully supported by the record," as Petitioners suggest [*Id.* at 11], there was no evidence to support any such finding or conclusion with respect to Respondents Atwood. In essence, Petitioners have extracted a hypothetical assumption from *dicta* in the Court of Appeals' opinion [Petitioners' App. 4, 6], and now want to transform and elevate it into a factual finding, when there was no evidentiary support in the record for that at all.[1]

Also undisputed is the fact that, at all relevant times, the parents themselves had absolutely no significant contacts, involvement or interest in the State of Arizona. As the Arizona trial court properly concluded, "[n]o contacts have been shown, let alone 'minimum contacts.' " [Petitioners' App. 27].

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[1] Regardless of the various *arguendo* assumptions made in the Arizona Court of Appeals' opinion, there was absolutely no evidence to support any contention that the Atwood parents "should have foreseen or did foresee that [Frank] Atwood would travel to Arizona and sexually assault a child here." [Petition at 7, quoting from Petitioners' App. 6].

Petitioners contend that "Frank Atwood was allowed to roam free and uncontrolled across the southwestern United States." [Petition at 4]. The facts, however, established that Frank had left the State of California on only two occasions between May and September, 1984. His destination both times was Oklahoma (not Tucson or anywhere else in Arizona), and his sole purpose in leaving California at all was to visit a friend (Mr. Bersienne) in Oklahoma. General and Mrs. Atwood had no prior knowledge of either of the two out-of-state trips, nor did they encourage or condone those. On the contrary, immediately after discovery of Frank's whereabouts, the parents contacted Frank and strongly urged him on both occasions to return to California, which he did.

After Frank's return from the second Oklahoma trip in early September, 1984, Respondent John Atwood voluntarily called Frank's parole agent, Respondent Robert McLean. In that phone conversation of September 6, 1984, at a time when Frank was still residing at the Atwood residence, General Atwood specifically advised McLean of the following:

- That Frank had made two trips to Oklahoma;
- That Frank had been alone with a 5 or 6 year old child in Oklahoma (a fact which General Atwood had learned directly from Frank);
- That Frank had sent a sexually explicit card to the child;
- That Frank was carrying a knife with a 4-5 inch blade;
- That Frank had also taken an extended trip to northern California in early August, 1984,

during which time he befriended one James McDonald, who became his traveling companion.

These undisputed facts belie Petitioners' accusation that "defendants did virtually nothing" in an effort to comply with whatever obligations they might have had [Petition at 4]. Moreover, contrary to the conclusory statement in Judge Hathaway's dissent in the Arizona Court of Appeals, there was no evidence at all that General and Mrs. Atwood "collaborated in [Frank Atwood's] parole violation." [Petitioners' App. 15].

Frank Atwood and his friend, Mr. McDonald, left the Atwood residence together in mid-September, 1984. They were equipped with camping gear and did not indicate where they were going.[2] General and Mrs. Atwood did not suspect or have any reason to believe that any out-of-state trips were in Frank's plans when he and McDonald left. On both prior occasions when Frank had left California, without his parents' knowledge or consent, it was to

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[2] The trial court record established the following: During times when Frank resided with his parents, it was not unusual for him to leave their residence and visit friends or go elsewhere for several days at a time, without telling his parents where he was or what his plans were. When Frank and McDonald left in mid-September, 1984, it was General and Mrs. Atwood's belief that they were going camping in the L.A. area. Though not expressed to the parents, if Frank and McDonald had any plans on leaving the L.A. area, General and Mrs. Atwood reasonably would have suspected that they might return to northern California, where Frank had traveled and stayed in early August, 1984, and from where McDonald's welfare checks were issued.

go visit Mr. Bersienne in Oklahoma; and any relationship between Bersienne and Frank Atwood admittedly was over as of September, 1984.

The abduction and murder of Vicki Lynne Hoskinson occurred on September 17, 1984, just two or three days after Frank and McDonald left the Atwood residence. After Frank's departure, General and Mrs. Atwood had no contact with him until September 20, 1984, when he called and informed them that he was in Texas. Within a few hours of first learning that the FBI was attempting to locate Frank, General Atwood voluntarily contacted the FBI on that same date, September 20, and informed them of Frank's specific whereabouts. It was that information that directly led to Frank's being located, arrested and extradited to Arizona.

While ignoring most of these uncontested facts supporting the Arizona courts' jurisdictional determination, Petitioners instead rely on the "facts . . . spelled out in more detail in the dissenting opinion of Judge Hathaway in the Court below" [Petition at 4]; but many of Judge Hathaway's observations had no relevance or application to the Atwood parents, and others were simply unsupported by the record. Judge Hathaway's dissenting opinion certainly was "impassioned," as Petitioners indicate [*Id.* at 7], but the majority opinion properly characterized the dissenting opinion as "a protracted jury argument" [Petitioners' App. 9, n. 4]; and the dissenting opinion had some significant factual omissions and misperceptions relating to the Atwood parents, as noted above.

Finally, Petitioners incorrectly suggest that realistically they had "no other functional or convenient

forum open to them." [Petition at 8]. That certainly is not true with respect to General and Mrs. Atwood, long-time California residents who easily could have been sued in that state, with no statutory or other legal impediments.

SUMMARY OF ARGUMENTS

A. The Petition for Writ of Certiorari should be denied because the Arizona court properly dismissed, without prejudice, Respondents John and Alice Atwood for lack of *in personam* jurisdiction in this action. That ruling, based on the Atwood parents having no "minimum contacts" at all with Arizona, was fully supported by the record and totally consistent with constitutional principles enunciated by this Court.

B. There are no special and important reasons warranting a writ of certiorari in this matter, nor is there any compelling reason to abandon or disregard "minimum contacts" requirements for personal jurisdiction.

ARGUMENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

A. The Petition for Writ of Certiorari should be denied because the Arizona courts' ruling that personal jurisdiction could not be constitutionally invoked over Respondents John and Alice Atwood in Arizona was correct and totally consistent with this Court's clear, controlling pronouncements.

From the inception of this case, Petitioners' jurisdictional argument has contained a major, glaring flaw which destroys any assertion of personal jurisdiction over

the Atwood parents. Petitioners all but conceded in the courts below that the Atwoods themselves had no "minimum contacts" with Arizona, did not purposefully direct any activities towards this state, and did not purposefully avail themselves of any privileges or benefits in Arizona. At bottom, Petitioners wish to bypass or overturn those requirements.

Instead, Petitioners seek to invoke personal jurisdiction over the Atwood parents solely on the basis of Frank J. Atwood's sordid background and criminal history, and his activities and travels from May-September, 1984. Petitioners further contend, without the benefit of any factual support in the record, that Frank Atwood's going to Arizona in September, 1984 and committing a heinous crime there was foreseeable to his parents, and was with their "full awareness of the possible consequences." [Petition at 9]. Petitioners also rely exclusively on such factors as Arizona's interest in adjudicating this controversy; the alleged convenience of the Arizona forum; and Petitioners' claim that the Atwood parents had fair warning and are not unduly surprised by a lawsuit against them in Arizona.

As this Court has repeatedly recognized, however, all of the foregoing factors are of secondary consideration and importance, and do not displace the primary requirement of "minimum contacts" that is central to the threshold jurisdictional determination. it is now well-settled that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v.*

Rudzewicz, 471 U.S. 462, 471-72 (1985), *quoting International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Equally well-established is the principle that jurisdiction must rest upon contacts which "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz, supra* at 475, *quoting McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis in original).

In essence, Petitioners seek to impute Frank Atwood's contacts with Arizona to his parents. There is no authority to support that position, however, and in fact the applicable decisions completely negate that proposition.[3] Jurisdiction cannot be vicariously invoked over the Atwood parents based on the activities or travels of their emancipated, adult son. Rather, it was incumbent upon Petitioners to establish that the parents themselves purposefully created contacts with the forum state. Petitioners' inability to do so properly resulted in dismissal without prejudice of Respondents Atwood from this

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[3] *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (in finding jurisdiction over defendants who were "primary participants in an alleged wrongdoing [libelous article in National Enquirer] intentionally directed" at a resident of the forum state, the Court noted that a defendant's contacts with the forum state "are not to be judged" according to the activities of others in the forum state: "Each defendant's contacts with the forum State must be assessed individually."); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 417 (1984) ("unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980).

action; and that ruling was entirely consistent with this Court's decisions.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court held that the "minimum contacts" requirement of *International Shoe Co. v. Washington, supra*, is met only when the defendant has "purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. Since that time, the Court has consistently upheld the purposeful availment requirement.[4] The *Burger King* case is a prime example of this. The Court in that case recognized each of the concepts that Petitioners rely upon so heavily in this matter, *e.g.*, "fair warning;" legitimate interests of the forum state; and access to a convenient forum. After recognizing such concerns and considerations, however, the *Burger King* Court was careful to note as follows:

> Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that

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[4] As the author in a leading Law Journal has noted: "Taken together, *World-Wide Volkswagen* (444 U.S. 286), *Keeton* (465 U.S. 770) and *Burger King* (471 U.S. 462) clearly establish the primacy of the concept of purposeful availment in personal jurisdiction analysis." Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 Duke L.J. 669, 674. *See also Kulko v. Superior Court*, 436 U.S. 84, 94 (1978).

this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. [471 U.S. at 474-75 (citations and footnotes omitted; emphasis in original)].

Contrary to Petitioners' suggestion, *Burger King* did not simply indicate "that the essence of 'purposeful availment' is that the defendant's connection with the forum

not be the result of 'random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person.' " [Petition at 12]. Rather, this Court recognized and approved the " 'purposeful availment' requirement." 471 U.S. at 475.[5]

In *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987), the purposeful availment requirement again was reaffirmed. Justice O'Connor's opinion rejected "mere foreseeability or awareness" as a "constitutionally sufficient basis for personal jurisdiction," noting that the " 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" 480 U.S. at 111, 112 (emphasis in original, citations omitted). Under Justice O'Connor's opinion, jurisdiction was found lacking, partly because the defendant did not "purposefully avail itself of the California market." 480 U.S. at 112.

While Justice Brennan's opinion disagreed with that conclusion, that disagreement was not based on any abandonment of the purposeful availment requirement.

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[5] Only if and when that requirement has been met, by the plaintiff establishing that defendant purposefully directed some activities at the forum state, is consideration of the other reasonableness and fairness factors warranted. *See Burger King Corp. v. Rudzewicz, supra* at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' ").

Rather, Justice Brennan simply concluded that the defendant had purposefully availed itself of the California market, since it was "aware that the final product [was] being marketed in the forum State." *Id.* at 117. Justice Stevens simply saw no need for the Court in that particular case "to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts." *Id.* at 122. Thus, the purposeful availment requirement remains intact.[6]

Any argument that that requirement has somehow been met with respect to the Atwood parents is not only inconsistent with this Court's decisions, but is devoid of any evidentiary support, logic or common sense. Regardless of whether the "purposeful availment" inquiry is addressed from an objective or subjective viewpoint, it makes no difference in this case. While Petitioners' attempted distinction between objective and subjective

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[6] As one leading commentator has observed: "*Asahi* thus clearly establishes that the existence of minimum contacts is a necessary but not sufficient condition to satisfy the constitutional requirements for personal jurisdiction," and "purposeful availment remains the most important element in almost all personal jurisdiction cases; the question dividing the Court concerns what constitutes purposeful availment." Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Ind. Co. v. Superior Court of California*, 1987 Duke L.J. pp. 669-91, at pp. 681, 682. The author concluded that "[a]ll [of the Justices] (with the possible exception of Justice Brennan) agree on one basic premise – that it is fundamentally unfair to require a person to defend himself before the courts of a sovereign with which he has not voluntarily associated himself." *Id.* at 683.

factors is not at all clear, even under Petitioners' analytical framework the Atwood parents did not have any "objectively reasonable expectation of an effect in the forum" proximately caused by any alleged act or omission on their parts. [Petition at 9].

Petitioners' position in this case is best summed up by their assertion that "the existence of reasonable anticipation of litigation in the impacted forum" satisfies all due process requirements for a state's assertion of personal jurisdiction over a non-resident defendant [Petition at 12].[7] While Petitioners rely on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Burger King Corp. v. Rudzewicz, supra*, to support that premise, those cases actually refute most of Petitioners' arguments and clearly support the Arizona courts' disposition of this matter. Petitioners' entire argument is premised on the contention that the Atwood parents knew or should have known that Frank would travel to Arizona and commit a crime there. Aside from the absence of any factual support in the record for that contention, it is certainly well-

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[7] A similar contention was made by Petitioners' Counsel of Record in a 1979 law review article, which took issue with well-established personal jurisdiction law in Arizona and this Court's cases. The author urged that the purposeful activity requirement be abandoned and that jurisdictional determinations be based only on "fair notice" and fairness factors. Based on his proposed jurisdictional framework, the author also incorrectly predicted this Court's disposition of the *World-Wide Volkswagen* case. *See* Woods, *Pennoyer's Demise: Personal Jurisdiction After Schaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 Ariz. L. Rev. 861-913 (1979). The thesis advocated in that article, however, has never been embraced or adopted by this Court.

established that "foreseeability of causing *injury* in another State" is not a " 'sufficient benchmark' for exercising personal jurisdiction." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295.

Petitioners' reliance on *Calder v. Jones*, 465 U.S. 783 (1984) also is misplaced.[8] The Court in *Calder* distinguished between general, untargeted negligence and the tortious actions by Mr. Calder which were expressly aimed at the forum state. Defendant Calder knew the potentially devastating impact of the libelous article edited, approved and disseminated in the forum state by him. He knew that the brunt of any injury would be felt in the state where the plaintiff lived and worked, and in which the libelous publication had its largest circulation. Under those circumstances, the Court held that "jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." 465 U.S. at 791. *Calder* simply underscores the inapplicability of the "effects"

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[8] Also unavailing is Petitioners' reference to section 37 of the Restatement (Second) Conflict of Laws. Application of that section hinges primarily on the "extent of the relationship of the state to the defendant and to the plaintiff." *Id.* Comment (a). The Atwood parents had no significant relationship to Arizona. Moreover, the so-called "effects" test of Restatement section 37 has never been applied to invoke jurisdiction in any reported cases even remotely resembling this one; and the Restatement cannot displace the Constitution's due process requirements. *See, e.g., Jacobs v. Lakewood Aircraft Serv., Inc.*, 493 F. Supp. 46, 50 (E.D. Pa. 1980); *Chittenden Trust Co. v. LaChance*, 464 F. Supp. 446, 449 n.3 (D. Vt. 1978).

analysis here and further supports the Arizona courts' dismissal of Respondents Atwood.

Petitioners' assertion of jurisdiction over the Atwood parents through an "effects" analysis also is undermined by *Kulko v. Superior Court*, 436 U.S. 84 (1978). Just as the non-resident father in *Kulko* "derive[d] no personal or commercial benefit from his child's presence in California and . . . lack[ed] any other relevant contact with the State" (436 U.S. at 100-01), the same is true of the Atwood parents regarding Frank's presence in Arizona. Thus, as in *Kulko*, "application of the minimum-contacts test in this case [would represent] an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just, nor reasonable." *Id.* at 92.[9]

The Arizona trial court's ruling and the Court of Appeals' affirmance were properly based on the conclusion that no evidence was presented "to support a finding of purposeful availment that would support jurisdiction in this case;" that "[n]o contacts have been shown, let alone 'minimum contacts;' " and that the Atwood parents engaged in no conduct that would "make it reasonable for them to anticipate being haled into court in Arizona for actions of Frank Jarvis Atwood." [Petitioners' App. 26-27]. Although this case involves a heinous crime, familial tragedy and emotionally powerful issues, that

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[9] *Kulko*, of course, is factually distinguishable from our case, and presented a stronger argument for jurisdiction, in that the non-resident parent knowingly and voluntarily sent his minor child to the forum state. In contrast, General and Mrs. Atwood did not encourage, request or direct their adult son to go to Arizona, let alone have any reason to know that he might engage in any criminal activity in that state.

should not be sufficient reason for granting review. The petition should be denied because the Arizona Court of Appeals' opinion was governed by, and totally consistent with, well-established constitutional principles recognized by this Court.[10]

B. There are no compelling reasons for this Court to overturn or substantially modify well-established personal jurisdiction principles, or to create unwarranted exceptions to the purposeful availment requirement in isolated cases.

Unable to reconcile their jurisdictional argument with this Court's decisions, Petitioners seek to overturn well-established precedent and decades of jurisdictional jurisprudence by either abandoning the purposeful availment requirement altogether, or by excepting this particular case from that constitutional prerequisite. This Court

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[10] The "special and important reasons" required for granting of a petition for writ of certiorari are conspicuously absent here. Moreover, this case does not involve a state court decision on "an important question of federal law which has not been, but should be, settled by this Court," or on "a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10. Indeed, the Court has recently denied certiorari in a case where the Sixth Circuit Court of Appeals ordered dismissal for lack of personal jurisdiction because the plaintiff "failed to pass the 'purposeful availment' test," which the Court of Appeals viewed as "essential" and even characterized as "the *sine qua non* for *in personam* jurisdiction.' " *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1300-03 (6th Cir. 1989), *quoting Southern Mach. Co. v. Mohasco Ind., Inc.*, 401 F.2d 374, 381-82 (6th Cir. 1968), *cert. denied*, 110 S. Ct. 1525 (1990).

should decline that invitation. There is no reason to simply discard the purposeful availment requirement in this case or in certain select cases, depending on the nature of the plaintiff's factual allegations or legal liability theories.[11]

Such an arbitrary, unprincipled approach would certainly result in much greater chaos and confusion than what Petitioners complain of now. It also would present opportunities for abuse. For example, plaintiffs might be inclined to plead dubious negligence claims in their complaints against nonresident defendants in order to benefit from less stringent standards for establishing jurisdiction. In short, the presence or absence of minimum contacts for jurisdictional purposes should not be governed by different standards depending upon the nature of the action.

Petitioners' concern that the Arizona Court of Appeals' opinion will exclude "from interstate personal jurisdiction all non-intentional torts" [Petition at 14] is unfounded. One can purposefully direct activities towards a forum state and be held accountable for negligence relating to such activities which proximately cause harm or damage in the forum state. Negligence (as a substantive basis for tort liability) and purposeful availment or direction (for jurisdictional purposes) are not

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[11] The contrary decisions of the Rhode Island District Court appear to be isolated anomalies, with no other authority to support, or other courts accepting, its view that the "purposeful availment doctrine does not apply to tort claims." *McAleer v. Smith*, 715 F. Supp. 1153, 1157 (D.R.I. 1989); *Bridge v. Invest America, Inc.*, 748 F. Supp. 948, 954 (D.R.I. 1990).

mutually exclusive concepts. Thus, as even some of Petitioners' own cited cases illustrate, there need not be an intentional tort in order for purposeful direction or availment to be established in the tort context for jurisdictional purposes.[12]

Moreover, the problems complained of by Petitioners are more imaginary than real. A broad-based, representative survey of personal jurisdiction decisions over the past decade leads to the conclusion that the principles enunciated by this Court are not only understandable but, for the most part, uniformly applied in a manner that typically does not produce anomalous or unjust results. The cases simply illustrate the fact that there are no "talismanic jurisdictional formulas" for resolving personal jurisdiction issues, and the facts of each case must always be evaluated and weighed. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 485. Contrary to Petitioners' contention, however, there is no significant problem with "conflicting results in the lower courts," nor do the cases demonstrate any pervasive "doctrinal disarray" or "existing discord in doctrine." [Petition at 9, 10, 17, 21].

The cases cited by Petitioners to demonstrate the alleged "doctrinal disarray" of which they complain evidence no such phenomenon at all, but rather can fairly be reconciled with this Court's decisions. For example, despite some questionable *dicta* in its opinion, the Court

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[12] *See, e.g., Fidelity State Bank and Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ___ F. Supp. ___, 1991 WL 116738 (D. Kan. 1991); *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991); *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 1522 (1991).

in *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 796 P.2d 189 (1990) recognized and followed appropriate jurisdictional guidelines, including the purposeful availment requirement. The *Simmons* Court simply held that the defendants had "purposefully interjected" themselves into the forum state and had purposefully availed themselves of the benefits and protections of Montana law. 796 P.2d at 197-98. One of the defendants had "engaged in extensive activity directed toward" Montana, and the other defendant had taken "affirmative steps to conduct business affecting Montana." *Id.* at 197, 198. Accordingly, it is not surprising, let alone inconsistent with this Court's pronouncements, that personal jurisdiction was found in that case.

Similarly, personal jurisdiction was found over a law partnership, but not the individual partners, in *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990). That was a legal malpractice action where the defendant/partnership was found to have invoked the benefits and protections of the forum state's laws, by activities including phone calls, letters and trips to the forum state (California), as well as requiring execution of a deed of trust to California real estate. 911 F.2d at 1363-64. Thus, because the partnership had "purposefully directed its activities to California, personal jurisdiction [was] presumptively reasonable." *Id.* at 1364. Respondents Atwood have no quarrel at all with that proposition, since it is consistent with this Court's decisions. *See, e.g., Burger King*, 471 U.S. at 477. Because Petitioners did not, and could not, establish that the Atwood parents purposefully directed any activities to Arizona, however, there clearly is no such presumption here.

Petitioners cite several U.S. District Court cases for the proposition that they incorrectly "compress the doctrines of personal jurisdiction . . . into a single test that looks to the defendant's state of mind and seeks to determine the purposefulness of the forum contact generated by the defendant." [Petition at 19]. Suffice it to say that the jurisdictional principles recognized and followed by those courts, and the holdings of those cases, are totally consistent with this Court's decisions; and they certainly do not evidence the "doctrinal conflicts" alleged by Petitioners. [Petition at 18].

The cases cited by Petitioners in support of their "objective awareness" theory also are inapposite. *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990) simply held that the defendant/insurance company "purposefully availed itself of the Montana forum when it contracted to indemnify and defend claims arising there." *Id.* at 914. That ruling was based on the fact that the defendant's "policy coverage extend[ed] into Montana and an insured event resulted in litigation there," and also on the proposition "that personal jurisdiction follows the insured risk." *Id.* at 913, 914. Thus, the insurance company's actions "satisfied the purposeful availment requirement." *Id.* at 913.

In *English & Smith v. Metzger*, 901 F.2d 36 (4th Cir. 1990), the Court found personal jurisdiction in Virginia over a California attorney where, among other activities, defendant initiated contact with plaintiff in Virginia, entered into contracts with plaintiff by virtue of action taken in Virginia, and carried on a continuing relationship with plaintiff in Virginia while the two worked on a case together. *Id.* at 39-40. Under those facts, the Court

properly found "purposeful direction of activities toward the forum" by the defendant. *Id.* at 39.

Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985) involved two defendants who "purposefully accepted assets . . . which they knew were subject to an injunction by the district court in Mississippi (the forum state)." *Id.* at 723. Under those facts, jurisdiction was found since the defendants "purposefully engaged in activity outside Mississippi that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum." *Id.* Thus, the *Waffenschmidt* Court was merely "holding them responsible for the intended consequences which their nonforum activities had on the subject matter of the court's order." *Id.* Again, there is nothing objectionable about that Court's opinion or holding, but they are wholly immaterial here.

The same is true of *O'Neil v. Picillo,* 682 F. Supp. 706 (D.R.I. 1988). That was a governmental action brought pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§9601 *et seq.* The non-resident defendants engaged "in heavily regulated activities" and dispatched into the stream of commerce "volatile and dangerous toxic substances," which were consciously and knowingly sent through intermediaries "on a virtual one-way journey to anywhere . . . . " *Id.* at 714 n.1. The defendants were analogized to interstate distributors and manufacturers, and the jurisdictional ruling was strongly influenced by the "inherently dangerous products" which defendants unleashed, and by the nationwide problems involving improper and illegal waste disposal procedures. *Id.* The

facts and holding of the *O'Neil* case simply have no pertinence to this action.

Lichon v. Aceto Chem. Co., Ltd., 182 Ill. App. 3d 672, 538 N.E.2d 613 (1989) involved a manufacturer/seller of a highly toxic chemical, the marketing and transportation of which was not limited by the manufacturer dispatching the substance into the stream of commerce. The *Lichon* Court simply adopted the reasoning of *O'Neil, supra,* and similar cases, which again bear no resemblance to ours. The Atwood parents cannot be fairly analogized to manufacturers of highly toxic chemicals or extremely dangerous products. Fully-grown, adult human beings, unlike inanimate products or waste materials, cannot be constantly monitored or controlled in the real world, particularly by parents who have no legal right or obligations in that regard.

Finally, *Roth v. Marquez*, ___ F.2d ___, 1991 WL 148316 (9th Cir. 1991) does not reflect any doctrinal confusion, nor does it support jurisdiction over Respondents Atwood in this case. The *Roth* Court recognized a three-part test for specific jurisdiction, including a requirement that "the nonresident defendant must have purposefully availed himself of the privilege of conducting activities in the forum by some affirmative act or conduct." 1991 WL 148316, p. 6. The Court also noted in *dicta* that within the tort context, the exercise of jurisdiction may be allowed "over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a foreign act having effect in the forum state." *Id., quoting Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986). Under that standard, Petitioners here could not establish the necessary threshold predicate for

assertion of jurisdiction over Respondents Atwood in Arizona, since there was no evidence of "purposeful direction" of any acts by them in or towards Arizona.

In sum, even the cases selected by Petitioners to support their argument are not inconsistent with this Court's decisions; and they certainly do not support Petitioners' jurisdictional claim against the Atwood parents here. Moreover, the practical problems noted by Petitioners as allegedly arising from the "[l]ack of coherent doctrine" also are more imaginary than real, particularly as they relate to this case. [Petition at 21]. Petitioners made a conscious, tactical decision to file suit in Arizona not because of any alleged "doctrinal problems" or because of any confusion regarding the purposeful availment requirement or its application, but rather because of the statutory immunity afforded the State of California defendants under California statute. Cal. Gov. Code section 845.8. As noted previously, there were no immunity considerations applicable to the Atwood parents, since Petitioners could have sued them in California and simply chose not to do so.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Arizona courts properly concluded that personal jurisdiction could not be constitutionally invoked against Respondents Atwood in Arizona. That conclusion, expressly affirmed by the Arizona Court of Appeals and implicitly concurred in by the Arizona Supreme Court, was properly premised on the undisputed facts

that the Atwood parents had no "minimum contacts" with Arizona, did not purposefully direct any activities into or towards Arizona or purposefully avail themselves of any benefits or privileges of Arizona law. Moreover, the factual record did not establish any conduct of the Atwood parents which would somehow provide them with "fair warning" that they might be subject to the jurisdiction of Arizona's courts, or which should have produced any reasonable anticipation of their being haled into court there. Because Petitioners failed to establish any sufficient basis to constitutionally invoke personal jurisdiction over Respondents Atwood in Arizona, they were properly dismissed from the action. For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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